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Nos. 03-334; 03-343

IN THE

Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF FORMER ATTORNEYS GENERAL OF THE UNITED STATES, FORMER DIRECTOR OF THE CIA, RETIRED MILITARY OFFICERS AND MEDAL OF HONOR WINNERS AND FORMER ASSISTANT ATTORNEY GENERAL IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici the Honorable William P. Barr, the Honorable Edwin Meese III, and the Honorable Richard Thornburgh are former Attorneys General of the United States.

Amicus the Honorable R. James Woolsey is former Director of Central Intelligence, former Ambassador to the Negotiation on the Conventional Armed Forces in Europe, and former Under Secretary of the Navy.

Amicus the Honorable Charles J. Cooper is former Assistant Attorney General for the Office of Legal Counsel.

Amicus General P.X. Kelley, USMC (Ret.) was Commandant of the Marine Corps and a Member of the Joint Chiefs of Staff from 1983 to 1987. He served two command tours in the Republic of Viet Nam.

Amicus Lieutenant General Nicolas B. Kehoe, USAF (Ret.) served 34 years in the Air Force, including high-level international security positions within our military and the North Atlantic Treaty Organization. He began his military career as a fighter pilot and flight instructor.

Amicus Major General Patrick H. Brady, USA (Ret.) served over 34 years in the Army, including two tours in the Republic of Viet Nam, during which he flew over 2000 combat missions, rescuing over 5000 wounded and earning the Medal of Honor, the Distinguished Service Cross, six Distinguished Flying Crosses, and the Purple Heart.

Amicus Major General James E. Livingston, USMC (Ret.) served over 33 years in the Marine Corps, including three tours in the Republic of Viet Nam. He has received the Medal of

1. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that counsel for *amici* authored this brief in its entirety. No person or entity other than *amici curiae* and their counsel made any monetary contribution to the preparation of this brief. Letters of consent to the filing of this brief from all parties to these consolidated cases have been filed with the Clerk of the Court.

Honor, the Distinguished Service Medal, Silver Star, Bronze Star, and the Purple Heart.

Amicus Colonel Jack Jacobs, USA (Ret.) served 21 years in the Army, including two tours in the Republic of Viet Nam. He has received the Medal of Honor, two Silver Stars, and three Bronze Stars.

Amici share the belief that judgments regarding the use of military power during an ongoing armed conflict are constitutionally committed to the President as Commander-in-Chief. *Amici* believe that the imposition of procedural and substantive constraints upon that power, akin to those that exist in the context of domestic criminal or civil proceedings, is both constitutionally unjustified and unwise. Such a result would embroil the federal courts in military, strategic, and political judgments, disrupt the unitary control and accountability the Framers provided for in the designation of one Commander-in-Chief, and place unprecedented and dangerous restrictions on our soldiers in the field of battle. *Amici* respectfully submit that the decision to detain a foreign national captured on the field of battle in order to prevent harm to our troops, to our military mission, or to our homeland, is a political question that cannot be reviewed by the federal courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

Both sets of petitioners in these cases attempt to frame the question before the Court as whether there exists any exception to a presumption in favor of judicial review of executive action. They would have the Court assume that both the writ of habeas corpus and the underlying constitutional guarantees it is designed to enforce apply to them, and then search for a statutory withdrawal or abridgment of that jurisdiction.[2] The Rasul

2. *See, e.g.*, Petitioners' Brief on the Merits at 14, *Rasul* v. *Bush*, No. 03-334 (U.S. Jan. 22, 2004) ("Rasul Br.") ("[T]he present case involves no remotely perceptible attempt by Congress to *abridge* jurisdiction." (emphasis added)); *id.* at 29-30 (noting the "absence of any Congressional indication that federal courts should be stripped of (Cont'd)

petitioners even argue that a finding of a lack of habeas jurisdiction in these cases would present serious constitutional questions under the Suspension Clause.[3]

Petitioners put the cart before the horse. Judicial review has never been held to be coextensive with every power that can be exercised by the political branches. Indeed, the very case that instituted judicial review also recognized that some judgments "are by the constitution and laws, submitted to the executive [and] can never be made in this court." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). In the context of the political branches' conduct of our external relations, and in particular in the exercise of the war powers, it is more accurate to say that there is a strong presumption *against* judicial review. "[T]he conduct of foreign relations [and] the war power are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-89 (1952); *see also, e.g.*, *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").

The fundamental error that runs through all of petitioners' arguments is the attempt to conflate the Commander-in-Chief's exercise of military power against an armed foreign enemy with the exercise of domestic law enforcement authority. These are two very distinct constitutional realms and the differences between them bear directly on the availability of judicial review. *See, e.g.*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-16 (1936). In the domestic realm of law enforcement, the government's role is disciplinary—sanctioning an errant member of society for transgressing the internal rules of the body politic. The Framers recognized that in the name of

(Cont'd)
their habeas jurisdiction"); Brief for Petitioners at 6-9, 8-23, *Al Odah* v. *United States*, No. 03-343 (U.S. Jan. 14, 2004) ("Al Odah Br.") (same).

3. *See* Rasul Br. at 21-23.

maintaining domestic tranquility an overzealous government could oppress the very body politic it is meant to protect.

Thus our Constitution makes the fundamental decision to sacrifice efficiency in the realm of law enforcement by guaranteeing that no punishment can be meted out in the absence of virtual certainty of individual guilt. Both the original Constitution and the Bill of Rights contain a number of specific constraints on the Executive's law enforcement powers, many of which expressly provide for a judicial role as a neutral arbiter or "check" on executive power. In this realm, the Executive's subjective judgments are irrelevant; it must gather and present objective evidence of guilt satisfying specific constitutional standards at each stage of a criminal proceeding. The underlying premise in this realm is that it is better for society to suffer the cost of the guilty going free than mistakenly to deprive an innocent person of life or liberty.

The situation is entirely different in armed conflict where the entire nation faces an external threat. In armed conflict, the body politic is not using its domestic disciplinary powers to sanction an errant member, rather it is exercising its *national defense powers* to neutralize the external threat and preserve the very foundation of all our civil liberties. Here the Constitution is not concerned with handicapping the government to preserve other values. Rather it is designed to maximize the government's efficiency to achieve victory—even at the cost of "collateral damage" that would be unacceptable in the domestic realm.

For this reason, the Constitution places exclusive authority to command military operations in the unitary Executive. In this realm, the President and his military subordinates must be free to act upon their subjective judgments as to where to attack, what level of force to apply, and who poses a danger to the success of the military mission. In this realm, the ideas that the President may take coercive action against persons or property only when he possesses a certain quantum of individualized evidence or that the judiciary should act as a "check" on his judgment as to the proper military course are absurd. *See United*

States v. *Verdugo-Urquidez*, 494 U.S. 259, 273-75 (1990). They would assign to our Framers an unspoken intent to place the United States at a distinct and unprecedented disadvantage in military conflict. *See Johnson* v. *Eisentrager*, 339 U.S. 763, 779 (1950).

In these cases, there is no doubt that the President is exercising his military powers as Commander-in-Chief. The United States has been confronted by a series of unprovoked attacks on military and civilian targets, culminating in the devastating attacks of September 11, 2001. It is well settled that even in the absence of congressional action, Article II fully empowers, indeed obligates, the President to respond with appropriate force to meet and defeat such threats. Here, in addition, Congress specifically authorized the President to use military force against "those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (emphasis added). Thus, exercising these combined powers under the Constitution, the President launched military action against al Qaida and the Taliban regime in Afghanistan.

Petitioners in these cases were captured by United States or allied military forces in the context of active military operations on the field of battle. They are all foreign nationals who have alleged no connection to the United States other than their capture and detention by our military forces. They are held not as punishment or a prelude to civilian criminal prosecution. Rather, after careful review through the military chain of command, while hostilities remain ongoing, the Executive Branch has made the judgment that their freedom or release would pose an unacceptable risk to our continuing military efforts.

Amici respectfully submit that the claims of these petitioners are beyond the jurisdiction of this or any federal court because they raise political questions. *See, e.g., Gilligan* v. *Morgan*,

413 U.S. 1, 8-9 (1973); *Baker* v. *Carr*, 369 U.S. 186, 216-17 (1962). The judgments at issue here are textually committed by the Constitution to the President as Commander-in-Chief and are quintessentially executive in nature. Because none of the constitutional rights applicable in the criminal context extends to foreign nationals captured on the field of battle, there are no judicially discoverable standards to apply. Nor can the President's military and political judgments regarding the conduct of a live conflict be reduced to any judicially manageable test or set of factors. The writ of habeas corpus has never been available to foreign nationals held as enemy combatants and its expansion here would produce the extraordinary consequence of setting the judiciary against the will of both political branches during ongoing hostilities. Finally, the imposition of judicially created standards or judicial review would fundamentally alter the combat mission of our troops from suppression of the enemy to the collection of evidence. It would cause lasting harm to our military's effectiveness and our ability to gather intelligence. For all these reasons, this Court should find that petitioners' claims are nonjusticiable and affirm the judgment below on that ground.[4]

ARGUMENT

I. The Judgments at Issue Here Are Textually Committed to the President as Commander-in Chief and Quintessentially Executive in Nature.

The Constitution designates the President "Commander in Chief of the Army and Navy of the United States." U.S. CONST. art. II, § 2. Once hostilities have begun the President is solely

4. *Amici* note that the United States argued that petitioners' actions were barred by the political question doctrine in the courts below and in its opposition to certiorari in this Court. Brief for Appellees at 32-34 & n.12, *Al Odah* v. *United States*, 321 F.3d 1134 (D.C. Cir. 2003) (Nos. 02-5251, *et al.*); Brief for Respondents in Opposition at 20 n.8, *Rasul* v. *United States*, Nos. 03-334 & 03-343 (U.S. Oct. 3, 2003). The political question doctrine thus provides an alternative ground upon which this Court can affirm the judgment below. *See, e.g.*, *Harris Trust & Savings Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000).

responsible for determining the methods of waging war. At the very core of the President's power as "Commander-in-Chief" is the exclusive authority to direct how, and against whom, military power is to be applied to achieve the military and political objectives of the campaign.[5]

The Framers made a conscious decision to place all authority regarding the actual conduct of armed conflict in the hands of the unitary Executive. As Alexander Hamilton noted in The Federalist No. 74, even those few state governments that entrusted the executive power to a multimember council, nonetheless placed the power to wield military power in the hands of a single person. He went on to say:

> Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.

THE FEDERALIST NO. 74, at 447 (Clinton Rossiter ed., 1961).

Notably absent from the constitutional clauses dealing with war powers is any mention of the courts. The Constitution's failure to confer on the judiciary any responsibility in the area of military operations contrasts sharply with the provisions applicable to criminal proceedings, where courts are afforded a

5. *See, e.g.*, *Ex parte Quirin*, 317 U.S. 1, 26 (1942) (recognizing that the Constitution "invests the President as Commander in Chief with the power to wage war which Congress has declared"); *Hamilton* v. *Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874) (emphasizing that the President "is constitutionally invested with the entire charge of hostile operations"); *see also DaCosta* v. *Laird*, 471 F.2d 1146, 1154 (2d Cir. 1973) (affirming that the Constitution contains a "specific textual commitment of decision-making responsibility in the area of military operations in a theatre of war to the President, in his capacity as Commander in Chief").

significant—indeed the primary—role in preserving individual liberties against legislative and executive overreaching. The Constitution contemplates, for example, that the judiciary will try criminal cases involving treason against the United States, U.S. CONST. art. III, § 3; that courts will oversee the issuance of search warrants, *id.* amend. IV; that grand juries will issue criminal indictments, *id.* amend. V; and that courts will afford criminal defendants "a speedy and public trial," *id.* amend. VI.

This interposition of judicial power between the Executive's law enforcement authority and members of the body politic stands in contrast to the complete absence of any judicial role in the exercise of military powers. Indeed, the idea that the federal judiciary should protect foreign nationals in the field of battle against the exercise of the military power of the United States is, as this Court noted in *Eisentrager*, an exceedingly novel one. 339 U.S. at 784. The concept of the judiciary as a "check" on an overzealous Executive in the context of domestic civil liberties makes sense. But such a "check" in the context of the exercise of the war powers against foreign dangers makes no sense at all. It would override the Framers' choice of unitary control and efficiency and place the judiciary in the position of according constitutional protections, not to members of the body politic, but to those who aim to destroy both the body politic and those very protections. *Id.* at 779; *Minotto* v. *Bradley*, 252 F. 600, 602 (N.D. Ill. 1918) (noting that the courts are not neutral in war but are allied with the sovereign against its enemies).

The lack of a judicial role in this area has been recognized since the earliest days of the Republic. In 1793, a federal district court declined to pass on a libel in admiralty because the case involved an offense to the territorial sovereignty of the United States by warring factions. The court reasoned that the response to this dispute was committed to the political branches and beyond the judicial power:

> Their power is confined to matters of internal police; externally they have no power: they have none of the powers of peace or war. They have no right to command the forces of the country; and these are the means after negociation fails, by which sovereigns decide their disputes. The courts of England, though they decide freely on all matters of internal police, will not meddle with these rights of the sovereign. They will not even grant a habeas corpus in the case of a prisoner of war, because the decision on this question is in another place, being part of the rights of sovereignty. Although our judiciary is somewhat differently arranged, I see not, in this respect, that they should not be equally cautious.

Moxon v. *The Fanny*, 17 F. Cas. (2 Pet. Adm.) 942, 947 (D. Pa. 1793).

By its very nature, the designation "Commander-in-Chief" recognizes no superior authority in the chain of military command. In armed conflict, that grant must include plenary authority to direct military force against persons or property the commander perceives as a threat to the safety of our forces, the safety of our homeland, or the ultimate military and political objectives of the war. The President may act not only to destroy hostile forces, but to deny them military advantage or to secure advantage for our forces. *See, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863). Thus he may expand the geographic theatre of war, destroy civilian property that could aid the enemy or endanger our forces, seize useful sources of intelligence information, and detain persons found in the field of battle he deems a threat to the success of the military mission. *See, e.g.*, *New Orleans* v. *Steamship Co.*, 87 U.S. (20 Wall.) 387, 394 (1874) (recognizing the military's authority in time of war to "do anything necessary to strengthen itself and weaken the enemy"). The President's power to wage war "is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict." *In re Yamashita*, 327 U.S. 1, 12 (1946).

At the heart of any of these military decisions is the judgment of what constitutes a threat or potential threat and what level of coercive force should be employed to deal with these dangers. *See The Prize Cases*, 67 U.S. at 679 (recognizing that the President "must determine what degree of force the crisis demands"). In each case, the President, with the advice of his military commanders, must make prudential judgments based upon an assessment of whether a risk is presented. Even in cases where there is substantial uncertainty whether particular individuals pose a danger, the President must make a judgment whether prudence nevertheless dictates treating such persons as hostile in order to avoid an unacceptable risk to our military objectives.

By their nature, these military judgments must rest upon a broad range of information, opinion, prediction, and even surmise. The President's assessment may include reports from his military and diplomatic advisors, field commanders, intelligence sources, or the opinions of allied nations. He must decide what weight to give each of these sources. He must evaluate risks in light of the present state of the conflict and the overall military and political objectives of the campaign. The "very nature of executive decisions" in this area "is political, not judicial." *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

Both sets of petitioners attempt to downplay any intrusion on the Executive's military powers by emphasizing that it has now been more than two years since their capture and that they are held "in a place far from the battlefield." Al Odah Br. at 12; Rasul Br. at 9. The Court should not be fooled. Neither their present location nor the fact that they have been held for two years changes the fact that petitioners seek judicial scrutiny of the basis for their detention, which inevitably involves the re-examination of decisions made on the battlefield itself during active hostilities. It also entails second-guessing the Executive's

judgment that their release *today* would pose an unacceptable risk in what is an ongoing conflict.[6]

II. Constitutional Rights Applicable to Criminal Prosecutions Do Not Apply to the Use of Military Power Against Foreign Nationals.

Throughout their briefs, petitioners use the language of the criminal law and rely upon principles developed in the context of criminal prosecution. Thus, petitioners argue that they are detained, "without charges, trial, access to counsel or the courts or process of any kind." Rasul Br. at 9. They claim they are "innocent of any wrongdoing," *id.*, and seek to require the Executive to establish an individualized factual predicate for their detention, as is required for pre-trial detainees. Al Odah Br. at 14 n.14.

They alternatively invoke the protections of the Fourth, Fifth, and Sixth Amendments. *See, e.g.*, Rasul Br. at 2 (right of grand jury indictment and right to counsel); *id.* at 17 n.18 (Fourth Amendment rights regarding seizure of the person (citing *Gerstein* v. *Pugh*, 420 U.S. 103 (1975)), and due process protections afforded to criminal defendants subject to pretrial detention (citing *United States* v. *Salerno*, 481 U.S. 739 (1987))).

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6. Petitioners are wrong when they suggest that this is a case where the President's actions are contrary to congressional will and that therefore the President's power is "at its lowest ebb." Rasul Br. at 14-15 & n.12; Al Odah Br. at 25 (both citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). In fact the opposite is true. In addition to the Joint Resolution authorizing the use of military force, Congress has continued to appropriate monies for the war effort, *see, e.g.*, Pub. L. No. 108-106, 117 Stat. 1209 (2003), as well as funds to construct new military facilities at Guantanamo Bay Naval Base. *See, e.g.*, Pub. L. No. 107-314, § 2201(b), 116 Stat. 2458, 2687 (2002). Thus, this is a case where the President's "authority is at its maximum," *Youngstown*, 343 U.S. at 635-37 (Jackson, J., concurring), and if "Congress chooses not to confront the President, it is not [the courts'] task to do so." *Goldwater* v. *Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring).

The Al Odah petitioners would have this Court find rights to counsel, visitation rights, and "access to an impartial tribunal to review whether any basis exists for their continued imprisonment," Al Odah Br. at 4-8, in the Due Process Clause of the Fifth Amendment.

In laying claim to these rights, petitioners ignore two critical legal principles. First, petitioners are not being detained pursuant to the Executive's domestic authority to punish them for any past violations of the criminal law. Their detention as enemy combatants is a tool of war, utilized by the Commander-in-Chief and his military subordinates to advance an ongoing military operation by preventing petitioners from rejoining the conflict or otherwise undermining our military and strategic goals.

Second, petitioners have no "substantial connections with this country," *Verdugo-Urquidez*, 494 U.S. at 271, that would allow them to claim the protection of the Bill of Rights. They have never attempted voluntarily to place themselves in any relation with the domestic body politic, and their only connection to the United States is that they were confronted by American military forces on the field of battle. They had no constitutional rights on the field of battle itself, and their capture by our military did not vest them with any such rights. *See id.* at 275 (Kennedy, J. concurring) ("the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory").[7]

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7. By necessity, both sets of petitioners are decidedly vague about exactly what constitutional rights they claim to possess, and when they claim to have first acquired those rights. If capture and military detention are sufficient to confer such rights, petitioners must have enjoyed them during their military detention in Afghanistan. This would mean that prisoners of war presently held in Iraq enjoy the same constitutional protections. By contrast, if petitioners' position is that they only acquired constitutional rights when they were involuntarily transferred to

(Cont'd)

One need look no further than the text of the Sixth Amendment to confirm that the Bill of Rights does not protect foreign nationals from the exercise of the military power in times of war. *See Eisentrager*, 339 U.S. at 782. The Sixth Amendment's opening clause, "[i]n all *criminal prosecutions*," U.S. CONST. amend. VI (emphasis added), limits its reach to the Executive's exercise of his domestic law enforcement authority. The rights enumerated thereafter confirm this limited application; the concepts of a speedy and public trial, an impartial jury drawn from "the State and district wherein the crime shall have been committed," and compulsory process, among others, *id.*, are impossible to apply in the context of foreign military actions. Thus, petitioners' rhetoric aside, nothing in the Constitution entitles them to a "trial" or anything like the adversarial proceeding described in the Sixth Amendment.

Similarly, the Fourth Amendment, by its terms, has no application to foreign nationals who can claim no connection to our body politic, and this Court has recognized that it cannot be applied to "foreign policy operations." *Verdugo-Urquidez*, 494 U.S. at 273. The Fourth Amendment provides, in part, that "[t]he right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV (emphasis added). As this Court has held, "the people" was "a term of art employed in select parts of the Constitution" that "refer[red] to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-Urquidez*, 494 U.S. at 265. And, according to this Court, the "history of the drafting of the Fourth Amendment also suggests that its

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(Cont'd)

Guantanamo Bay, then their possession of those rights is entirely dependent on the executive decision to detain them there. Yet elsewhere petitioners argue that their constitutional rights and access to the courts *cannot* depend upon the Executive's decision to detain them in a particular location. *See, e.g.*, Al Odah Br. at 7-8 & n.7.

purpose was to restrict searches and seizures which might be conducted by the United States *in domestic matters*." *Id.* at 266 (emphasis added).

Indeed, as the Court explained in *Verdugo-Urquidez*, contemporaries of the Framers authorized the President, in an undeclared war with France, " 'to subdue, seize and take any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas.' " *Id.* at 267 (citation omitted). Both United States naval forces and privateers acting by order of the President boarded and seized foreign ships without affording their crews any of the protections enumerated in the Fourth Amendment. "[B]ut it was never suggested that the Fourth Amendment restrained the authority of congress or of United States agents to conduct operations such as this." *Id.* at 268.

This Court has also rejected the notion that the protections of the Fifth Amendment apply to foreign persons outside the territory of the United States. Its "rejection of extraterritorial application of the Fifth Amendment was emphatic," *id.* at 269:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.

Eisentrager, 339 U.S. at 784; *see also Quirin*, 317 U.S. at 40-41. The *Eisentrager* Court further relied on the text of the Fifth Amendment to confirm its limited application. As the Court explained, any reading of the Fifth Amendment that would give foreign nationals more rights than those afforded to American citizen soldiers and sailors "in actual service in time of War,"

is simply absurd. 339 U.S. at 782-83 ("It would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies.").[8]

Finally, as a logical matter, if any of these protections traditionally applicable in American criminal cases were read to apply to enemy combatants held pursuant to military authority during active hostilities, there is no reason why other constitutional rights would not also be so extended. *See id.* at 784. This Court has exposed the idea that battlefield combatants are entitled to the full panoply of constitutional protections as a frivolous one. *See id.* at 784-85. There is no principled basis upon which the Court can accord these petitioners certain constitutional rights and not others. And if they possess those rights at Guantanamo Bay, there is no principled basis to deny them those rights at any other stage of their capture of confinement.

III. There Are No Judicially Manageable Standards To Apply to Military Judgments Made During an Ongoing Conflict.

Both sets of petitioners claim a right to some form of adversarial process by which they may challenge their military

8. Even if the Due Process Clause did apply to these petitioners, it is clear that they have received all the process that they are due in the context of military detention. "Of the roughly 10,000 people that were originally detained in Afghanistan, fewer than ten percent were brought to Guantanamo Bay in the first place. The vast majority were processed in Afghanistan and released in Afghanistan." Secretary Rumsfeld Remarks to Greater Miami Chamber of Commerce (Feb. 13, 2004) <http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html>. In addition, the Executive has undertaken a comprehensive, multi-layered, and ongoing review of the proper classification of each prisoner at Guantanamo Bay. *Id.* What petitioners seek is an "impartial tribunal" and some form of adversarial process either supervised by or conducted by a civilian court. That process is incompatible with the decision being made—in meeting and defeating attacks on the United States, the President's duty as Commander-in-Chief is not to be "neutral and detached," but rather to place the security of our nation and our military forces above the interests of the enemy or even those suspected of being the enemy.

detention, either in a federal court or in an "impartial tribunal" ordered by a federal court. These claims depend upon the proposition that the Commander-in-Chief is required to meet some evidentiary standard, some predicate threshold, before he may use the coercive power of the United States military against a particular individual in the field of battle. An essential corollary to this proposition is that the federal courts are capable of devising and applying procedural rules and substantive standards to constrain the President's discretion in this area.

Neither the proposition nor its corollary can withstand scrutiny. The conduct of war cannot be reduced to an individualized balancing of rights against interests. The military cannot be required to develop an evidentiary predicate before attacking a particular position, using a particular weapon, or detaining and holding persons found in the field of battle. By its nature, war causes collateral damage every day that would be a *per se* violation of the Due Process Clause in the domestic setting. *See, e.g.*, *United States* v. *Caltex (Phillipines), Inc.*, 344 U.S. 149 (1953); *Juragua Iron Co.* v. *United States*, 212 U.S. 297 (1909).

Nor is a civilian court capable of developing judicially manageable standards to either govern or evaluate military judgments made during an ongoing conflict. A court cannot declare the Executive's judgment here "valid" or "invalid" the way it would a search warrant or an arrest in the domestic realm. Rather, it could only register disagreement as a policy matter with the balancing of competing interests by the primary decision maker, whose institutional competence and sources of information are vastly superior to that of the judiciary in this area. *Gilligan*, 413 U.S. at 10 ("it is difficult to conceive of an area of governmental activity in which the courts have less competence"); *Curtiss-Wright*, 299 U.S. at 320 (noting the superior sources of information available to the Executive Branch in the context of a foreign conflict).

Because none of the specific guarantees of the Fourth, Fifth, or Sixth Amendments applies, *see supra* Part II, none of the

well-established benchmarks for executive conduct in the area of domestic law enforcement can offer the federal courts any guide for evaluation of the military judgments at issue here. The Court would be called upon to invent substantive and procedural rules from whole cloth, with no guidance from the text or history of the Constitution. Petitioners' vague calls for an "impartial tribunal" and "legal process" leave unanswered a host of questions that the federal courts would be required to answer if this Court approves the exercise of jurisdiction over these cases. Who bears the burden of proof in these proceedings and what is the proper evidentiary standard (*e.g.*, reasonable suspicion, probable cause, preponderance of the evidence, or beyond a reasonable doubt)? What rights would prisoners of war enjoy in these impartial proceedings (*e.g.*, rights of compulsory process, to confront witnesses, to receive "exculpatory" evidence from the government)? Would the rules of evidence apply to exclude all hearsay, including intelligence information?

War is necessarily rife with uncertainties that cannot be reduced to a particular quantum of proof in a trial-like forum. Even a small risk that a person confronted on the battlefield is a threat may justify coercive military action—even lethal action—where the potential harm is great. In such circumstances, the Commander-in-Chief and his military subordinates may conclude that any mistake from *failure to act* would have such grave consequences that they must adopt a sweeping approach that exposes persons who may be "not guilty," in the sense that term is used in our criminal law, to coercive military force.[9]

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9. For example, suppose there is a chance that one of the petitioners in these cases is a trained nuclear scientist who is a member or sympathizer of al Qaida. The President has made a prudential judgment that this person must be detained for the safety of our troops and the homeland. By what standard will a federal court second guess that judgment or impose a legal and evidentiary framework according to which the judgment must be made? Moreover, unlike the President, a federal court is not politically accountable to the American people if its decision to order the release of such a detainee has tragic consequences.

It is for these reasons, that the federal courts have consistently declined to impose "legal process" on the President's decisions to use military force, including the Viet Nam War, *see, e.g.*, *Luftig* v. *McNamara*, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); the bombing of Cambodia, *see, e.g.*, *Holtzman* v. *Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); the provision of military aid in El Salvador, *see, e.g.*, *Crockett* v. *Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); the provision of military aid in Nicaragua, *see, e.g.*, *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202 (D.C. Cir. 1985); the deployment of armed forces to the Persian Gulf, *see, e.g.*, *Lowry* v. *Reagan*, 676 F. Supp. 333 (D.D.C. 1987); the removal from power of Panamanian General Manuel Noriega, *see, e.g.*, *Industria Panificadora, S.A.* v. *United States*, 763 F. Supp. 1154 (D.D.C. 1991), *aff'd*, 957 F.2d 886 (D.C. Cir.), *cert. denied*, 506 U.S. 908 (1992); and Operation Desert Storm, *see, e.g.*, *Ange* v. *Bush*, 752 F. Supp. 509 (D.D.C. 1990).

These precedents reflect the fundamental principles that decisions regarding the use of military power in response to external threats "should fall upon the shoulders of those elected by the people to make those decisions," *Ange*, 752 F. Supp. at 513, and that the judiciary is not institutionally capable of reviewing the myriad political and strategic considerations that underlie such decisions, *Gilligan*, 413 U.S. at 10-11.

Any attempt to arrive at such a set of standards for these cases in the present state of the conflict, based on a snapshot in time of the circumstances of an ongoing war, would risk placing the Commander-in-Chief in a legal straitjacket in responding to future developments that a court cannot possibly foresee. Even if a "court could *possibly* devise a manageable set of standards for answering the questions . . . , world politics today change so rapidly that it might, by setting forth rules, create a rigid matrix that would unnecessarily restrict the executive some time in the future when the powers denied today may be essential to the well-being of the United States then." *Atlee* v. *Laird*, 347 F.

Supp. 689, 707 (E.D. Pa. 1972) (emphasis added); *Holtzman*, 484 F.2d at 1311 (noting that the situation in Cambodia "fluctuates daily and we cannot ascertain at any fixed time either the military or diplomatic status").

These concerns are clearly present here. The war against both al Qaida and the Taliban is still active and over 8,000 American troops remain in the Afghanistan theatre in harm's way. Judicial restrictions on the military detention of persons captured in the field of battle could have a direct and deleterious effect on the military's ability to defeat the remaining Taliban and al Qaida elements, who continue to attack our troops and our allies in an attempt to destabilize the new government in Kabul.

Petitioners attempt to distance themselves from these precedents and the ongoing conflict by claiming that they "are not challenging any action taken in 'occupied territory' or on the field of battle." Al Odah Br. at 22 n.44. This cannot be accurate. As noted above, petitioners' claims that they are innocent of any wrongdoing and that they are not adherents of al Qaida or the Taliban *necessarily require a judicial inquiry into their conduct on the battlefield and their interaction with United States and allied military forces in the zone of battle*, as well as into the Executive's *continuing judgment* that their release would cause harm to the military mission. *See supra* pp. 10-11. Moreover, by their nature such judicial inquiries will establish standards that the Executive will be required to follow in future encounters with persons *on the field of battle*.

Nor could federal courts effectively *apply* any set of standards to the President's judgments in these cases. The exercise of jurisdiction over these petitioners' claims would require federal courts to intrude into the President's most sensitive sources of military and political intelligence. The Rasul petitioners would require the President to produce such information directly to a federal court in a habeas corpus proceeding. The Al Odah petitioners would require the Executive to conduct the equivalent of an on-the-record hearing under the

Administrative Procedure Act, presumably followed by judicial review.[10] As this Court has held, the judiciary has neither the constitutional warrant nor the institutional capacity to review decisions based upon intelligence sources and information that should remain within the Executive Branch:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidence.

Chicago & Southern Air Lines, 333 U.S. at 111; *Dep't of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988); *Totten* v. *United States*, 92 U.S. (2 Otto) 105, 106-07 (1875); *see also Holtzman*, 484 F.2d at 1310 ("We are not privy to the information supplied to the Executive by his professional military and diplomatic advisers and even if we were, we are incompetent to evaluate it.").

Finally, this is a case where the greater power must include the lesser, and neither is subject to judicial constraint. Petitioners make no claim that a military decision to use lethal force against them on the field of battle would be subject to judicial scrutiny. Yet they claim that because a lesser degree of military force

10. At one point in their brief, the Al Odah petitioners indicate that they seek only executive process and "do not contend that an Article III court must itself conduct that process and review the basis for each individual detention." Al Odah Br. at 47. Yet they devote a substantial portion of their brief to arguing that the judicial review provisions of the APA apply to their case and none of the military exceptions to judicial review is applicable. *Id.* at 21-23. Thus, at the end of the day, even the Al Odah petitioners would have the federal courts make the final decisions in this area, as they do when they sit in review of any administrative agency, under one of the standards specified in 5 U.S.C. § 706.

was used against them, a duty arose in the Executive to justify his actions in court. But as discussed above, the constitutional nature of both decisions is the same—a strategic and military judgment that is beyond the realm of judicial review. *See, e.g.*, *Ludecke* v. *Watkins*, 335 U.S. 160, 166 (1948) ("A war power not subject to judicial review is not transmuted into a judicially reviewable action because the President chooses to have that power exercised within narrower limits . . . .").

IV. The Writ of Habeas Corpus Has Never Been Extended To Aid Foreign Persons Found on the Battlefield and Detained as Enemy Combatants.

Far from supporting the petitioners' calls for judicial intervention, both the English and early American history of the writ of habeas corpus reveals that the writ was unavailable to prisoners of war or enemy combatants. For the English courts, enemy aliens and combatants simply had no rights against the Crown that could be enforced via the writ. The English courts also expressed concern that entertaining jurisdiction over the writ in such circumstances would constitute judicial interference with the exercise of sovereign powers that belonged to the Crown alone. These same concerns animate the early American cases, and along with the limitations implied in the Suspension Clause itself, they make clear that the writ does not extend to foreign nationals captured in the field of battle.

The history of the writ at English common law makes clear that it did not protect prisoners of war or enemy combatants. As traditionally understood, the writ was never available to "an alien enemy who is a prisoner of war." 9 *Halsbury's Laws of England* (*Halsbury*) pt. III, ¶ 1212, at 710-11 (2d ed. 1933) (the writ "will not be granted . . . to an alien enemy who is a prisoner of war"); *see Schaffenius* v. *Goldberg*, 1 K.B. 284, 305 (1916) (Ld. J. Warrington) ("The authorities that have been cited to us with regard to prisoners of war in old times only go to this, that the prisoner of war could not sue out a writ of habeas corpus. Of course nobody now disputes that."); *Moxon*, 17

F. Cas. at 947. When the "safety of the realm" was at issue, "and the Government thereupon intern[ed] . . . alien enem[ies], the action of the Executive in so doing [wa]s not open to review by the Courts by *habeas corpus*." *Halsbury*, ¶ 1202 note (c), at 703.

For those alien enemies who invaded the realm, it was equally clear that no resort could be had to the courts for issuance of the writ because the alien enemy invader had no rights at all. *See Sylvester's Case*, 7 Mod. 150 (K.B. 1703) ("If an alien enemy come into England without the queen's protection, he shall be seized and imprisoned by the law of England, and he shall have no advantage by the law of England, nor for any wrong done to him here."); *see also Rex* v. *Knockaloe Camp Commandant*, 87 L.J.K.B. 43, 46 (1917) (Avery, J.) ("There is clear authority that a person who is an alien enemy prisoner of war is not entitled to apply to the Court for a writ of *habeas corpus*.").

The fact of imprisonment in the King's realm did not alter the alien enemy prisoner of war's legal entitlement—he still could not obtain a writ of habeas corpus. *See, e.g., Rex* v. *Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K.B. 1759) (denying the writ to a prisoner of war held captive in Liverpool); *Three Spanish Sailors*, 2 Black W. 1324, 96 Eng. Rep. 775 (K.B. 1779) (declaring that "alien enemies and prisoners of war [are] not entitled to any of the privileges of Englishmen; much less to be set at liberty on habeas corpus" and denying the writ to Spanish seaman brought as prisoners of war to England); *see also Furly* v. *Newnham*, 2 Doug. K.B. 419 (1780) ("The Court will not grant a habeas corpus ad testificandum to bring up a prisoner of war" in context where American prisoner of war was held at Plymouth.).

Nor did the enemy's claim that he was the national of a neutral nation, pressed into service by an enemy nation, captured by privateers, or misled as to his status help his cause. *Schiever*, 2 Burr. 765, 97 Eng. Rep. at 551 (man claimed to have been the "subject of a neutral power, taken on board of an enemy's ship; but forced . . . into the enemy's services"); *see also Three Spanish Sailors*, 2 W.B. 1324, 96 Eng. Rep. at 775 (Spanish

seamen claimed "they were taken as prisoners of war on board of a Spanish privateer," transferred to an English ship on promise of work for wages, and then turned over by the English captain as prisoners of war). [11]

The sole reference to the writ of habeas corpus in the Constitution confirms that the Framers did not intend access to the writ to extend to foreign nationals captured outside the United States. The Suspension Clause provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, *unless when in Cases of Rebellion or Invasion the Public Safety may require it.*" U.S. CONST. art. I, § 9 (emphasis added). The language of the exception confirms the Framers' understanding that the writ did not apply to military operations abroad. Only where military operations took place on U.S. soil was there any need to address the possibility of suspension. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866) (discussing martial rule and suspension of the writ in the context of invasion or rebellion within the United States). That the Framers were aware that the United States could be called upon to fight in foreign wars cannot be doubted. Yet, they did not provide for suspension of the writ in cases of attacks by or upon American forces abroad. The absence of any exception in the case of overseas conflicts indicates that the Framers never intended that the writ would be *extended* to aliens involved in wars on foreign soil. Moreover, such an extension would mean that the writ could *never* be suspended in the case of foreign conflicts. The limited reach of the writ is further confirmed by the reference to "the Public Safety," tying both the scope of the writ and the scope of the exception to the domestic body politic.

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11. Contrary to the suggestion made in the Brief Amici Curiae of Legal Historians in Support of Petitioners at 20-24, English common law cases do not reveal searching judicial review into whether persons seeking the writ were in fact "alien enemies." Instead, as discussed above, each of the cases cited by the Legal Historians involves threshold dismissal of the petitioner's case regardless of his factual allegations attacking his "alien enemy" or "prisoner of war" status.

Not only do petitioners' claims to the writ lack any support in its history or the text of the Constitution, they can find no support in the decisions of this Court. Petitioners' argument on this score is a contrived pastiche of quotations from cases involving criminal defendants, resident aliens, or persons convicted of war crimes in military tribunals. What petitioners cannot find is any precedent for a court entertaining the writ to examine and possibly overturn the President's judgment that a foreign national captured in the field of battle must be held as an enemy combatant while hostilities are ongoing. The lack of any such case is a testimony to the extraordinary expansion of both the writ and judicial power sought by these petitioners.

Both sets of petitioners also rely heavily upon this Court's decisions in *Quirin* and *Yamashita* for the proposition that jurisdiction lies here and the only question at issue is scope of review. Neither decision supports the exercise of habeas jurisdiction over these petitioners' claims. *Quirin* does not even suggest that foreign nationals held as enemy combatants can invoke the writ. The Court avoided the question by noting that at least one petitioner (Haupt) claimed to be an American citizen and *all* the petitioners had at one time been residents of the United States. 317 U.S. at 20. This Court has subsequently indicated that jurisdiction in *Quirin* was predicated on several factors, none of which is present in the context of detention of enemy combatants captured abroad.[12] In fact, the *Quirin* Court expressly left open the question whether Congress had *any* constitutional authority to "restrict the power of the Commander-in-Chief to deal with enemy belligerents." *Id.* at 20. *Quirin* certainly cannot be read for the proposition that Congress has

12. *See, e.g., Eisentrager*, 339 U.S. at 779-80 (distinguishing *Quirin* because, *inter alia*, it involved a prisoner who "was, or claimed to be, a citizen," the prisoners "were tried by a Military Commission sitting in the District of Columbia when civil courts were open and functioning normally," and "[t]hey were arrested by civil authorities and the prosecution was directed by the Attorney General, a civilian prosecutor").

limited the power of the Executive to detain "enemy belligerents" through the vehicle of the habeas corpus statute.

More fundamentally, neither *Quirin* nor *Yamashita* involved review of a military decision to detain foreign nationals as enemy combatants in order to incapacitate them during hostilities. Both cases involved the individualized trial and punishment of particular prisoners of war for violations of the laws of war. The military commissions in which the *Quirin* petitioners and Yamashita were tried were held pursuant to a statute recognizing the President's authority to convene military commissions consistent with the laws of war. *See Quirin*, 317 U.S. at 26-27; *Yamashita*, 327 U.S. at 7. In both cases, the Court refused to engage in any examination of the merits of the military commission's decision, focusing only on whether there was jurisdiction within the terms of the Articles of War. *Quirin*, 317 U.S. at 25 ("We are not concerned here with any question of the guilt or innocence of petitioners."); *Yamashita*, 327 U.S. at 17 ("We do not here appraise the evidence on which petitioner was convicted. . . . These are questions within the peculiar competence of the military officers composing the commission and were for it to decide.").

Thus, the *Quirin* and *Yamashita* Courts not only limited their inquiries to the question of jurisdiction, they expressly eschewed any review of the underlying merits of the military decisions themselves. Neither case says anything about judicial review of enemy combatant status, or the power of the President to detain enemy combatants during ongoing hostilities. And both cases decline to review exactly the kind of military judgments concerning battlefield conduct and status that these petitioners seek to put before the federal courts.[13]

13. Indeed, even in the context of the review of detention of *resident aliens* under the Alien Enemy Act, this Court has recognized its constitutional and institutional incapacity to review the judgments of the President regarding a military need for continued detention of

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Finally, it does not advance petitioners' cause to suggest that their circumstances—being alleged nationals of friendly nations caught up with enemy forces—are somehow unique in the annals of war. In fact, included among the more than 400,000 prisoners of war held in the United States during World War II were Russian or Polish nationals deemed to be enemy combatants by the United States or its allies. Many claimed to be civilians mistakenly swept up with the capture of German troops, and many were part of German forced-labor battalions who were involuntarily pressed into the service of the enemy. These prisoners of war were nationals of friendly nations, as petitioners claim to be here, but it was undoubtedly within the power of our military forces to meet them as enemies in the field and to hold them as enemy combatants when captured. They were no more entitled to the writ of habeas corpus than were the German troops whom they fought beside, and no court of law has ever held otherwise. If the writ lies for these petitioners, it must perforce lie for any enemy combatant who makes a *post hoc* claim that he was not an actual belligerent.

V. Judicial Review in this Context Would Cause Grave Harm to Both the Military and the National Security.

Petitioners' status as enemy combatants has been reviewed and re-reviewed within the Executive Branch and the military command structure. Nevertheless, petitioners claim that they are constitutionally entitled to an evaluation of the factual predicate for their detention through some judicial or quasi-judicial proceeding, involving an impartial arbiter and an

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potentially hostile foreign nationals. *See, e.g., Ludecke*, 335 U.S. at 170 ("It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come. These matters are of political judgment for which judges have neither technical competence nor official responsibility.").

adversarial testing of evidence. What they seek is a judicial "check on the power of the executive," Al Odah Br. at 42, in order to alter the "executive's focus" from defending the nation to the protection of the personal liberties of those we are fighting against, *id.* at 45. By definition, the imposition of legal process on the Executive's exercise of the war power and the introduction of the judiciary as a second decision maker in this area will impair the efficiency of our military forces. The very purpose of such constraints in the domestic criminal realm is to sacrifice efficiency and unitary control in order to protect other values. As this Court has noted, extension of these concepts to the use of military power in armed conflict would have "significant and deleterious consequences for the United States in conducting activities beyond its boundaries." *Verdugo-Urquidez*, 494 U.S. at 273; *Eisentrager*, 339 U.S. at 779.

Any such extension of the judicial power to the supervision of our military operations in time of war would not only be wholly unprecedented, but it would be fundamentally incompatible with the power to wage war itself, so altering and degrading that capacity as to negate the Constitution's grant of that power to the President.

First, the imposition of such procedures would fundamentally alter the character and mission of our combat troops. To the extent that the decisions to detain persons as enemy combatants are based in part on the circumstances of the initial encounter on the battlefield, our frontline troops will have to concern themselves with developing and preserving evidence as to each individual they capture, at the same time as they confront enemy forces in the field. They would be diverted from their primary mission—the rapid destruction of the enemy by all means at their disposal—to taking notes on the conduct of particular individuals in the field of battle. Like policeman, they would also face the prospect of removal from the battlefield to give evidence in a habeas court or a court-ordered proceeding. *See Eisentrager*, 339 U.S. at 779.

Nor would the harm stop there. Under petitioners' theory, the military would have to take on the further burden of detailed investigation of petitioners' factual claims once they are taken to the rear. Again, this would radically change the nature of the military enterprise. To establish the capacity to conduct individualized investigations and adversarial hearings as to every detained combatant would make the conduct of war—especially irregular warfare—vastly more cumbersome and expensive. For every platoon of combat troops, the United States would have to field three platoons of lawyers, investigators, and paralegals. Such a result would inject legal uncertainty into our military operations, divert resources from winning the war into demonstrating the individual "fault" of persons confronted in the field of battle, and thereby uniquely disadvantage our military vis-à-vis every other fighting force in the world.

Second, the introduction of an ultimate decision maker outside of the normal chain of command, or altogether outside the Executive Branch, would disrupt the unitary chain of command and undermine the confidence of frontline troops in their superior officers. The impartial tribunals petitioners seek could literally overrule command decisions regarding battlefield tactics and set free prisoners of war whom American soldiers have risked or given their lives to capture. The effect of such a prospect on military discipline and morale is impossible to predict, *Chappell* v. *Wallace*, 462 U.S. 296, 300, 305 (1983) (courts are " 'ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have' " (citation omitted)), but it cannot be positive.

Third, exercising jurisdiction over petitioner's claims would directly threaten our relations with our allies in the continuing war effort. Allies will naturally hesitate to entrust us with prisoners captured in the field of battle if our military's promise to detain them is an empty one. If our allies question our ability to detain enemy combatants, or feel that their own actions may be subject to subsequent judicial scrutiny, they will have a strong

disincentive to turn battlefield prisoners over to the United States, thus denying our forces a potentially valuable source of intelligence. Indeed, a detailed set of post hoc judicial procedures imposed upon the capture of prisoners of war may well have the perverse effect of encouraging both allies and our own forces to prefer lethal over non-lethal force.

Fourth, judicial review of presidential judgments regarding the treatment of prisoners of war would directly undermine the ability of the United States to speak with "one voice" to allies, neutrals, and foes alike. Promises made to allies could be broken by judicial decree, and threats made to the enemy could be rendered idle. *Eisentrager*, 339 U.S. at 779 ("Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.").

Finally, by necessity the decisions of the Executive Branch in this area are based upon myriad intelligence sources, many of which are extremely sensitive in nature. In the context of the "impartial review" petitioners seek, must the Executive produce or identify the intelligence sources regarding petitioners' adherence to the enemy or their activities in the field of battle? The imposition of adversarial proceedings on executive decision making in this area entails the possibility that the Executive may be forced to release a person whom he knows to be hostile and to pose a continuing threat to our military operations in order not to comprise intelligence sources. While we are willing to accept such a possibility in the enforcement of our criminal laws, *see, e.g.*, Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1-16, we simply cannot do so in the context of our national security.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed on the ground that the military judgments at issue in these cases are political questions whose resolution is textually committed to the President as Commander-in-Chief.

Respectfully submitted,

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